

This is the second preliminary hearing held in this case. The first preliminary hearing was held on October 8, 1997, before Administrative Law Judge Floyd V. Palmer. As a result of that preliminary hearing, the Administrative Law Judge entered a preliminary

hearing Order for Compensation dated October 15, 1997. He found claimant had suffered an accidental injury that arose out of and in the course of his employment with the respondent and further found claimant had given respondent timely notice of the accident. The Administrative Law Judge ordered respondent to provide claimant with medical treatment for his low-back injury with an orthopedist. The respondent appealed, and the Appeals Board affirmed the Administrative Law Judge in an Order dated November 26, 1997. Dr. Craig L. Vosburgh was selected to treat claimant and saw claimant on two occasions, December 1, 1997, and January 12, 1998. Dr. Vosburgh treated claimant conservatively and determined on January 12, 1998, he had reached maximum medical improvement and released claimant to return as needed.

At the September 22, 1998, preliminary hearing, claimant testified that in the preceding six months his low-back condition had worsened to the point he had lost mobility and had to regularly take pain medication because of the pain and discomfort. John A. Pazell, M.D., conducted an independent medical examination of claimant at claimant's attorney's request on May 19, 1998. In the doctor's report dated June 17, 1998, he found claimant had not met maximum medical improvement. He found claimant was in need of an MRI scan. Depending on the MRI scan, the doctor opined claimant may need additional epidural steroid injections or he may need to have a myelogram and CT scan. Additionally, the doctor opined claimant may even need to have surgery, should the conservative measures fail.

Respondent argues, as it did at the previous preliminary hearing, that claimant did not injure his low back at work. Respondent asserts claimant's low-back problems are simply a continuation of claimant's long history of low-back problems. Respondent points out, as it did in the previous preliminary hearing, that claimant did not give a history to the physicians who treated him in June of 1997 that he injured his low back at work. Claimant testified, as he did at the previous preliminary hearing, the reason he did not mention he had hurt his low back at work was because his supervisor, Valerie Cowan, told him respondent was not responsible for his low back problem because he had the problem before he started working for respondent.

At the first preliminary hearing, respondent had claimant's supervisor, Valerie Cowan, testify. Claimant testified he had notified her on the day of his accident that he had hurt his back at work. Ms. Cowan testified she did not recall claimant notifying her of an injury but claimant might have said something about the injury.

At this preliminary hearing, respondent had Don Leonard testify. Mr. Leonard alleged he was claimant's supervisor on the date of claimant's accident, June 6, 1997. An affidavit from Valerie Cowan was offered and admitted into evidence. In the affidavit, Ms. Cowan stated she was not claimant's supervisor on June 6, 1997. Mr. Leonard further testified claimant had not notified him that he had injured his back at work on June 6, 1997. However, Mr. Leonard also testified there were other supervisors claimant could have

notified of the accident. Mr. Leonard further testified that Valerie Cowan could have been at the respondent's plant on the morning of June 6, 1997.

After Mr. Leonard testified, the claimant testified in rebuttal. During the rebuttal testimony, the Administrative Law Judge questioned the claimant on whether or not he reported his injury to Valerie Cowan. Claimant, as he had previously testified at the first preliminary hearing, unequivocally told the Administrative Law Judge he had notified his supervisor Valerie Cowan on June 6, 1997, he had injured his back at work.

The Administrative Law Judge had the opportunity to observe the in-person testimony of both claimant and Mr. Leonard. The Appeals Board finds the credibility of the claimant is the issue in this case. The Administrative Law Judge had to believe claimant when he found claimant's low-back injury occurred at work and that he gave respondent timely notice of the accident. The Appeals Board finds some deference should be given to the Administrative Law Judge's findings and conclusions because he was able to personally observe the witnesses testify in this matter. Therefore, giving some deference to the Administrative Law Judge, the Appeals Board finds the preliminary hearing order should be affirmed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge Brad E. Avery's Order for Medical Treatment dated September 29, 1998, should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of November 1998.

BOARD MEMBER

c: James L. Wisler, Topeka, KS
Bret C. Owen, Topeka, KS
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director